



# MAINTAINING UNION-FREE STATUS AFTER SAN MANUEL INDIAN BINGO AND CASINO V. NLRB

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On February 9, 2007, the Court of Appeals for the District of Columbia held that the National Labor Relations Act (NLRA) applies to a tribe's on-reservation gaming establishment, and the NLRB has jurisdiction over tribal enterprises engaged in commercial activity, whether on or off reservation. The Court held that principles of tribal sovereign immunity did not preclude the enforcement of the NLRA's provisions relating to employment activities. Thus, unless a matter involves general traditional government functions, the National Labor Relations Board (NLRB) may assert that it has jurisdiction over commercial activity. The definition of commercial or governmental activity, however, has not been firmly established.

Until more courts analyze *San Manuel Indian Bingo's* holding, all tribes engaged in commercial activity involving the employment of non Native Americans should watch out for signs of union organizing activity.

## Labor Unions

- A labor union is a group of employees that ban together to bargain collectively with their employer over wages, hours, benefits, and other terms and conditions of employment. These organizations are affiliated with a "local," "national," or "international" unions.
- An employer is not required to agree to anything the union proposes; it is only required to meet with the union and talk. The union can make demands, the employer can make demands. Wages can go up, they can come down, or they can stay the same.
- Hard feelings often are created when a union comes to an enterprise. A union usually tells employees that management is bad, that their supervisors are unfair, guilty of favoritism and cannot be trusted, and/or they need a union to protect them.
- A union has one major weapon to get an employer to agree to the union's demands: the STRIKE.
  - when employees go on strike, their pay and non-accrued benefits stop
  - economic strikers can be permanently replaced
  - picket lines often involve threats, coercion, and violence by the union and its supporters.

## Why Employees Organize

- Favoritism, lack of appreciation, lack of communication, not feeling in on things ("no voice"), concerns about job security. Money is not usually a primary motivator.

## Organizing Strategies and Techniques

- Unions employ professional union organizers. The typical union organizer:
  - has been trained at a union organizing school operated by a union
  - has handled dozens of union organizing campaigns
- Unions create internet websites permitting employees to browse "virtual union halls" from their own house and sign authorization cards
- Unions target and train groups of pro-union sympathizers. These employees comprise the union's "in-house organizing committee" (about 10-20% of the potential voting unit)
  - identification of potential leaders

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- representative sampling of employees at the facility: by department, by job classifications, by minority and ethnic groups, and by gender
  - Unions conduct meetings to explain the benefits of organizing, answer employee questions and prepare the workforce for additional union organizing efforts
  - Unions obtain lists of names and addresses of all employees from sympathetic employees and by license plate “matches”
  - Unions solicit and distribute union literature at the workplace to obtain the support of uncommitted employees. They:
    - use both in-house committee and outside organizers
    - use leaflets to arouse employee interest, both “canned” and customized
  - Card signing campaign and the union petition
    - all of the above steps are undertaken in an attempt to obtain employee support and obtain signatures on union authorization cards
    - a union can file a representation petition at the NLRB with as few as 30% of the employees in the proposed voting unit but unions typically do not file a representation petition at the NLRB without the signature of a majority of employee signatures, often 70-80%.

## The Impact of Unions

- Labor contract provisions may place an employer in an uncompetitive situation — inability to subcontract, lack of management rights
- “Corporate campaigns” conducted by unions
- Unions often create divisiveness between an employer and its employees (“us versus them”) to justify their own existence
- By law, an employer loses the right to deal with employees individually about wages, hours, and other terms and conditions of employment if it becomes unionized
- Disruption caused by strikes
- Labor contracts often increase job rigidity and lead to difficulties in advancing employees based upon merit — job assignments, transfers, promotions, and overtime distribution decisions are constantly second-guessed
- Supervisors have to deal with employees who refuse to perform duties on ground that they are “not part of the employee’s job”
- Supervisor’s problems in with dealing with union stewards who may constantly bring grievances to the supervisor’s attention that must be formally addressed, regardless of merit

## The National Labor Relations Act: Unfair Labor Practices

- Affords employees the right to engage in or to refuse to engage in union or other concerted activities regarding wages, hours, and other terms and conditions of employment
- Prohibits employers, including supervisors, from interfering, restraining or coercing any employee in the exercise of his or her right to engage in or support union or concerted activities

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- Prohibits employers, including supervisors, from assisting or dominating a union representing their employees
  - Prohibits employers, including supervisors, from discriminating against employees as a result of his or her union activity, or because he or she has participated in NLRB proceedings against the employer, and
  - Prohibits employers, including supervisors, from refusing to bargain with employees or from taking actions that suggest it would be futile for employees to select a union as their bargaining representative.

## The NLRB

- Has field offices in over 30 regions of the country and a centralized 5 member Board in Washington, D.C.
- Investigates unfair labor practice charges and prosecutes unfair labor practice complaints against employers and unions
- Conducts elections to determine whether a majority of employees desire union representation and regulates election conduct to ensure a fair election.

## Union Authorization Cards

- Authorization cards are used to support a union's showing of interest
  - For an NLRB election (30% in proposed voting unit)
  - For recognition (50% plus one in proposed unit)
- Many authorization cards are signed by employees without firm conviction (or due to misrepresentation)
  - "Bandwagons"
  - "Only purpose is to obtain an election"
  - "Necessary to attend union meetings and to obtain the benefits of union contract"
  - "Necessary for employee to keep his/her job if the union wins the elections"

## Response to Union Activity

The employer should ensure that all of the following occur within 48 hours (and ideally within 24 hours) of the employer first learning about card signing:

- Identify the in-house union organizing committee
  - Identify the hourly/salaried employees who are representing the union on the shop floor. What departments are they in? What shifts? What are their job duties and do they have access to other employees in other departments?
  - Is union organizing activity occurring on other shifts? If so, identify the hourly/salaried employees who are representing the union on those shifts.

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- Develop a comprehensive “profile” on each internal organizing committee person, *i.e.*, name, age, years with enterprise, departments they have worked in and for how long, general attitude, past or present disciplinary problems, years in community, etc.
  - Identify the external union organizers
    - Identify, by name, the outside organizers. Identify which local they represent and what town the local is in.
    - Identify specifically which union they represent, and immediately begin gathering intelligence information (strike history, recent organizing history in the area, financial documents, area contracts, the union’s constitution and by-laws) on the union.
    - Develop, as comprehensively as possible, a “profile” on each external organizer, *i.e.*, where they work, how long, whether they are experienced organizers, whether they have tried to organize other companies in the area, whether they were successful and their organizing style.
  - Identify the issues that are causing the organizing efforts
  - Identify the positive attributes about the location which can be highlighted to derail the card signing
  - Identify pro-employer/anti-union employees and inform them (lawfully) of their right to oppose unionization and to campaign against the union
  - Determine when supervisory/management training concerning do’s and don’ts, t.i.p.s. (don’t threaten, interrogate, promise, or spy), early warning signs, etc., should occur. When did they receive training last? This training is needed to eliminate the likelihood of unfair labor practice charges.
    - Begin to develop a campaign communications plan. Who will do what, when? involve all levels of management in the campaign process
  - Draft a “don’t sign the cards” speech that the manager can deliver to assembled employees. Prepare a handout to be distributed to employees communicating a “don’t sign the cards” message

## Best Way to Remain Union Free - Make the Union Unnecessary

- Show employees they do not need a third party coming into the facility to ensure fair treatment and consideration
  - as long as employees are treated fairly, there is no need for a union
  - without a union, problems can be adjusted individually and there is more personal contact between employees and management
- Maintain consistency, avoid employee perceptions of unfairness or favoritism
- Know and uniformly apply rules:
  - weigh cost/benefits and be able to justify any deviation from the rules
  - beware of the sudden application of rules not previously applied in practice
  - use practical review of disciplinary actions to review disciplinary actions
- Show greater appreciation for employees
  - feedback is critical – give praise along with suggestions for improvement when needed

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- Foster the belief that employees are “in on things”
    - supervisors should be knowledgeable about announcements, policy developments and news, and communicate these items to employees through informal and formal practices. This gives the supervisor credibility and prestige and will likely encourage employee communication with the supervisor
  - Address employee concerns about job security
    - the best way to maintain job security is to perform at best of ability and work to assure enterprise does likewise. A third party like the union is not the equivalent to job security. Job security can only be assured through continued customer goodwill.

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